United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1355

In The

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

RICHARD JOSEPH TODARO,

Appellant.

Appeal from the United States District Court for the Western District of New York

APPELLANT'S BRIEF

Herald Price Fahringer, Esq.
Attorney for Appellant
Barbara J. Davies, Esq.
On the Brief
One Niagara Square
Buffalo, New York 14202
(716) 849-1333

Lipsitz, Green, Fahringer,
Roll, Schuller & James
of Counsel

October, 1976

Daily Record Corporation
Rochester, New York

(2325)

Spaulding Law Printing
Syracuse, New York

Table of Contents

Preliminary Statement

This unhappy case is about Richard Todaro, who is 40 years old, married, and the father of four young children. In 1972 he called a bookmaker in Buffalo ten times and gave him the point spread or "line" on basketball games. The man who usually supplied a "line" to this small gambling operation was on vacation in Florida and so Richard Todaro filled in for him.

Appellant had absolutely no interest in the bookmaking enterprise that he accommodated with betting odds for ten days. Nevertheless, he was charged, in a three count indictment, with conspiracy and violations of sections 1955 (Federal Gambling) and 2232 (Destroying Property that is the Subject of a Search Warrant)*.

The bookmakers, who were all charged in a separate indictment, pleaded guilty to transmitting gambling information in violation of § 1084(a) and received suspended sentences or probation. Richard Todaro decided to stand trial because he believed that his minimal contact with the bookmakers did not constitute "conducting" an illegal gambling business under §1955.

The court dismissed the conspiracy charge for lack of evidence but the jury, after deliberating for two days, convicted appellant of violating sections 1955 and 2232 and the court sentenced him to three years imprisonment. Thus, for the first time in the annals of this circuit the bookmakers, who concededly operated an illegal gambling business for over a year, were placed on probation and the man who only supplied the "line" for ten days received a three year prison sentence. An appeal to this court was seasonably mounted.

---

*When two FBI agents entered appellant's home on March 6, 1972, he ignited a piece of flash paper, without knowing it was covered by a search warrant. Thus, he was charged with the violation of §2232.

Table of Cases

Page

QUESTIONS PRESENTED

1. Whether the conviction under section 1955 must be reversed because:
   (a) appellant's guilt was not proven beyond a reasonable doubt;
   (b) merely offering betting odds to a bookmaker does not come within the reach of §1955;
   (c) the government failed to prove a sporting event as required by New York law;
   (d) the government failed to prove five persons participated in the illegal gambling operation;
   (e) the dismissal of the conspiracy charge requires a directed verdict of acquittal under §1955.

2. Whether the evidence was insufficient to support a conviction for destroying property in violation of 18 U.S.C. §2232.

3. Whether appellant's sentence should be reviewed by this court because there was a manifest and gross abuse of discretion.

STATUTES INVOLVED

18 U.S.C. §1955

Prohibition of Illegal Gambling Businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section -

(1) "illegal gambling business" means a gambling business which -

> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or number games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

18 U.S.C. §2232

Destruction or Removal of Property to Prevent Seizure

Whoever, before, during, or after seizure of any property by any person authorized to make searches and seizures, in order to prevent the seizure or securing of any goods, wares, or merchandise by such person, staves, breaks, throws overboard, destroys, or removes the same, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

STATEMENT OF FACTS

The facts relevant to this appeal are for the most part uncontroverted and therefore may be introduced to the court in a summary fashion. On February 6, 1973, Richard Todaro was charged in a three count indictment with:

> (1) conspiracy to violate §1955 (Federal Gambling),
>
> (2) a violation of §1955, making it a federal offense for five persons to conduct an illegal gambling operation, and
>
> (3) destroying property that is the subject of a search warrant in violation of §2232.

Between February 16 and 27, 1972, Richard Todaro was asked to supply the odds on basketball games to a bookmaking operation located in Buffalo, New York while Stephen Castellani, the owner of another bookmaking establishment was on vacation in Florida (193, 404, 408, 446, 450, 503). Despite the fact that Stephen Castellani considered himself an expert at making up a line, he acknowledged that he would "reach out" and check his line against that of other handicappers and against the information published in newspapers (496, 501).

When Stephen Castellani's son, Anthony opened his own bookmaking business he received the line information from his father or sources arranged by him (279). * It was only when the elder Castellani went on vacation that appellant's information was used, and then only as a double check (503). The bookmakers often "moved the line" or altered the odds, indicating the nonessential character of the information Richard Todaro relayed in the few telephone calls (394, 397). ** At no time other than the brief period from February 16 to February 27, 1972 did appellant have any dealings with either of these two separate bookmaking enterprises.

---

* The proof disclosed two separate bookmaking operations that were generally known as the Riverside News Stand and Kenmore News Shop (404, 405, 465).

** "Moving the line" is best explained by an example. If the point spread on the Jets-Buffalo game favored the Jets by six points (Jets+6) and the bookmakers found that all his customers are betting on the Jets, he will raise the points on that team to 7 or 8 to encourage betting on Buffalo so that his book balances out. He may also move the line on his own initiative because of a "feeling" he may have that the game is lopsided.

Moreover, a search of appellant's home by two FBI agents on March 6, 1972 revealed no betting sheets or gambling paraphernalia (629). Appellant had apparently destroyed a piece of flash paper without knowing it was the subject of a search warrant. Other facts relevant to appellant's telephoning the odds on various basketball games and the FBI search of his home will be developed in the argument portion of this brief.

The Trial

Appellant's trial commenced on April 20, 1976. The chief prosecution witnesses were admitted bookmakers Anthony Castellani and his father Stephen Castellani, both of whom testified under a grant of immunity (133, 187, 188, 435, 513). They acknowledged that Richard Todaro had no interest in their businesses and that he only supplied the line as an accommodation when the older Castellani was away on vacation. On September 8, 1972 the Castellanis had plead guilty to violations of

18 U.S.C. §1084(a) and were subsequently placed on probation. *

At the close of the evidence, the court granted appellant's motion to dismiss the conspiracy count (728, 729). On April 29, 1976 the jury convicted appellant on Counts II and III (968). On August 17, 1976 the court denied appellant's motion for acquittal and sentenced Richard Todaro to three years in prison on Count II and one year on Count III, the sentences to run concurrently (980, 991).

---

* Disposition of Criminal Charges
Plea of Guilty to 18 U.S.C. §1084(a) on September 8, 1972

Defendant	Cr. No.	Sentence (November 17, 1972)
Stephen Castellani	1972-167	$2000 fine; suspended two-year sentence; five years probation
Anthony Castellani	1972-168	$1000 fine; suspended one-year sentence; five years probation
Richard Giglia	1972-166	$1000 fine; suspended one-year sentence; five years probation
Sam Giglia	1972-165	suspended sentence; five years probation
John Zak	1972-169	five years probation

POINT I

THE CONVICTION UNDER SECTION 1955 MUST BE REVERSED BECAUSE:

(a) his guilt was not proven beyond a reasonable doubt;

(b) merely offering betting odds to a bookmaker does not come within the reach of §1955;

(c) the government failed to prove a sporting event as required by New York Law;

(d) the government failed to prove five persons participated in the illegal gambling operation;

(e) the dismissal of the conspiracy charge requires a directed verdict of acquittal under §1955.

Seldom has there been so unwarranted a conviction upon such impoverished proof. Appellant placed a total of a mere ten telephone calls during a twelve day period to two bookmakers. He concededly supplied a "basketball line" - mere information about the point spread between different basketball teams - and nothing more (532-536). The information appellant furnished the bookmaker was available to anyone who had access to sporting news, newspapers, radio or television. Therefore, appellant's limited and isolated contacts with these bookmakers were

nonessential, intermittent, and wholly unrelated to their success or failure. It is undisputed Richard Todaro was not interested in either operation.

The question which dominates this appeal involves a novel issue, never before decided by this Court. That question may be simply stated as, whether the making of ten isolated "line" calls constitutes conducting all or part of an illegal gambling business under §1955. Thus, this case leads the Court into an area of §1955 previously unexplored.

No one ever contended that appellant "financed, managed, supervised, directed, or owned" any part of the bookmaking businesses. Stephen Castellani denied that the appellant was involved in any way in either of the bookmaking businesses (511). The information received from appellant was not essential to the bookmakers' operations because they did not, when accepting bets, use the appellant's line (399, 400). Moreover, the line supplied by appellant to the bookmakers, for these few days, often coincided with the odds published in sports papers available to the general public, such as Basketball (577-80).*

---

*Basketball is a weekly newspaper that publishes the basketball schedules and point spreads on all games played during a given week.

Therefore, it is apparent that appellant's point spreads was viewed by the experienced bookmakers as no more reliable than other published lines.

Viewing the evidence in the light most favorable to the government, the bookmaking businesses operated out of two apartments at Terrace Boulevard, Depew (a small town outside of Buffalo) and at Ontario Street in Buffalo. Julia Martin, the tenant of the Ontario Street apartment, would place a call to someone in New York City to receive the line published in the New York Post (463, 471). Stephen Castellani, a bookmaker, usually made up his own lines and by self-acclamation was one of the best handicappers in the trade (496). He described the process of making up a line as involving the analyzing of various sports papers (e.g. Basketball or the Sports Eye) and listening to various sports announcers about current team strengths and weaknesses as well as checking with a number of other individuals (496-98). Therefore, it is evident that whatever small bit of line information appellant supplied to the bookmaking operations was only a small part of the general information that the bookmakers

received from numerous sources.* The fact that appellant may have been paid for his service does not, as the court correctly indicated in its charge, make his actions any less nonessential (950). Similarly, the payment of rent, telephone bills, and light and heat for the bookmaking operation does not make the landlord, the telephone company, or the utility"conductors"of an illegal gambling business.

A government expert testified that the point spread appellant supplied is readily available to the public, thus demonstrating the insignificant character of Todaro's ten telephone calls. Moreover, he conceded that it was common for a bookmaker not to use the line given him. The expert

---

*During the argument on the motion to dismiss the charges, the court told the prosecutor that "you must agree that a line was obtained from many sources, New York Post, Daily News" (680). The court noted further that "if all a man gives is information then I cannot see how you can charge him because then no one is safe because bookmakers get information from all kinds of people, casual conversations" (681). Judge Curtin most definitely was concerned that appellant not be convicted for the mere furnishing of information: "if it is informational only that then, it seems to me, that you have certainly a problem (in proving that a defendant conducts)" (688).

The court maintained its stance concerning furnishing odds when it charged "if it was informational only such as the kind of information you get from a newspaper, then it cannot be considered to be in the nature of conducting" (949).

admitted that "line" information is available to the public from a variety of sources, including the following:

1. New York Post (562)
2. Buffalo Courier Express (570)
3. Jimmy the Greek's Syndicated Column (565-67)
4. Huey's Dial-a-Winner (569)
5. Basketball (577, 578)
6. Weekly Professional Football Schedule (568)
7. Sports Information News Service (568)
8. The Gold Sheet (556, 563).

Other similar sports sheets were marked as defense exhibits 2-A through 18 (563).

An example of one of these sport sheets is reproduced on the next page.

Each of these sport sheets is available for public consumption (564). Agent Holmes admitted that the above could be classified as a publication or source that gave the line or the power ratings from which the line could be calculated (570). The expert conceded that a professional bookmaker who utilized the line supplied from some outside party would verify this information with that published in the above editions in order to have the best possible data on point spreads (571-73).

Football News Letter

$2.50 VOL. 6 NOVEMBER 2, 1974 NO. 8

EXPANDED FORMAT

UPI TELETYPE FLASHES

COLLEGE INJURIES

OKLAHOMA ST. — No. 1 FB-GEORGE PALMER lost for season with knee injury vs. Nebr. - PALMER ended up being the games top rusher with 120 yds. in 27 carries. It was his 3rd straight 100 yd game ... **U.C.L.A.** — No. 1 QB-JOHN SCIRRA lost for season after suffering broken ankle in 2nd Q. vs. Calif. ... **GEORGIA TECH** — starting QB-RUDY ALLEN missed entire 2nd hall after being injured in 2nd Q. - replacement and former starting QB-MEYERS, sparked team to victory - ALLEN status (?) ... **MIAMI, FLA.** — star RB-WOODY THOMPSON suffered a seperated shoulder vs. Notre Dame and will be lost for 3 wks ... **T.C.U.** — RB-KENT WALDREP suffered a broken neck in loss to Ala. - WALDREP is listed in critical condition. ... **CORNELL** — No. 1 RB-DAN FANELLI, who has been the Big Reds No. 1 rusher and point getter, will be sidelined 1-2 wks with ankle injury - missed last wk's Yale game ... **YALE** — No. 1 PB and team captain GREEN played and scored teams first TD vs. Cornell after being injured and removed from game wk. earliar ... **WASH. ST.** — No. 1 RB-JONES out 2-3 wks with seperated shoulder ... **KANSAS** — star RB-MILLER, ave. better than 6.0 yards per carry, out indefinitely with leg injury ... **VANDERBILT** — No. 1 QB-FISHER reported recovered fully but may have hard time getting job back as No. 2 QB-LEE doing excellent job ... **MISSISSIPPI** — reported No. 1 QB-LYONS sidelined vs. Vanderbilt, reason unknown ... **NOTRE DAME** — speedster ERIC PENNICK saw limited action last wk after being sidelined prior to season with knee injury - PENNICK who will teamup with RB-ART BEST who has also returned from injury will give Irish needed outside speed ... **DUKE** — suffered major loss when it was learned teams No. 1 and No. 2 rushers may be lost for seson - FB-MIKE BOMGARDNER and TB-LARRY MARTINEZ both suffered knee injuries 2 wks ago vs. Clemson - strong safty MARK JOHNSON will be out 2-3 games with shoulder injury - No. 1 QB-BOB CORBET who was injured early in season and slated to return in mid-season - will not be ready until final 2 games, replacement SPEARS has filled in more than adequately.

(continued)

PITTSBURGH 16 - Philadelphia 13 — Ck. Mon. nite; Steeler fans unhappy with lack of Off. punch - Team has played 18 Q's without a scoring drive from own territory.
(11:00) ('70 Reg.Season: Phila. 30-20 at Phila.) (SR: Eagles 41-24-3)

DETROIT 17 - New Orleans 10 — series indicates team at home the victor - Lions given edge off last 3 games.
(1:00) ('73 Reg.Season: N.O. 20-13 at N.O.) (SR: Saints 2-1-1)

Cincinnati 28 - BALTIMORE 20 — Coach Brown should get 200th professional coaching victory after 2 straight loses - Q.B.-Domes should be back at the helm.
(2:00) ('72 Reg.Season: Balt. 20-19 at Cinn) (SR: Colts 2-0)

Minnesota 27 - CHICAGO 10 — Bears need victory but no match for Vikings after 2 straight loses - Tarkenton's experience will tell. (2:00) ('74 Reg.Season: Minn. 11-7 at Minn.)
(SR: Bears 13-12-2)

Washington 24 - GREEN BAY 16 — veteran, Jurgensen, should pick on once powerful Packer defense - Gr.Bay may start Hadl in order to get offensive punch.
(2:00) ('72 Reg.Season: Wash. 21-16 at Wash. & 16-3 at Wash. - NFC Playoff) (SR: Packers 8-7)

DALLAS 31 - St. Louis 21 — Cowboys on the move - Record could have been 6-1 - Last three Cardinal games may have extended team too much.
(2:00) ('74 Reg.Season: St. Lou. 31-28 at St. Lou) (SR: Dal 13-11-1)

MIAMI 24 - Atlanta 7 — Dolphins should get 1st victory vs. point spread - Most offense injured should be ready.
(4:00) ('70 Reg.Season: Miami 20-7 at Atl.) (SR: Dolphins 1-0)

N.Y. Giants 21 - KANSAS CITY 16 — Morton may be the Giants answer - Team has managed only 24 pts. in last 4 games - dissention reported at K.C.
(4:00) (First Meeting)

Oakland 24 - DENVER 23 — Raiders in for real battle - Broncos victory a must in Western Division game - score could be reversed. (4:00) ('73 Reg.Season: Tie 23-23 at Den; Oak. 21-17 at Oak.) (SR: raiders 21-5-2)

Cleveland 17 - SAN DIEGO 14 — Browns last 2 games may be indication for upset victory here - Chargers home record like playing on road.
(4:00) ('73 Reg.Season: Tie 16-16 at Clev) (SR: Tied 1-1)

MONDAY, NOVEMBER 4TH

Los Angeles 24 - SAN FRANCISCO 14 — 49er's QB-Owens has shown great poise as rookie; not convinced Rams made right move with Harris.
(9:00 Nat.T.V.) ('74 Reg.Season: L.A. 37-14 at L.A.)
(SR: Rams 30-17-2)

WFL FORECAST

WEDNESDAY, NOVEMBER 6th

Sou. Califonia 22 - HAWAIIANS 20 — NFL dropouts, QB Johnson and isenbargan keep game close - won 5 of last 7.
(1:30 AM Thur)('74 Reg.Season: Calif. 38-13 at Calif.)(SR: Sun 1-0)

MEMPHIS 41 - Chicago 15 — The Fire has been losing players to injuries - no contest here with QB-Huarte leading the way.
(8:00)('74 Reg.Season: Memphis 25-17 at Chicago)(SR: Mem. 1-0)

PORTLAND 16 - Florida 14 — Storm's Beathard has team in complete reversal since early season - win needed for playoffs.
(11:00) ('74 Reg.Season: Fla. 11-7 at Fla.) (SR: Blazers 1-0)

BIRMINGHAM 32 - Philadelphia 25 — Leagues No. 2 passer, Corcoran duels with Mira and star receivers Homan and Jenkins to no avail.
(9:00) (First Meeting)

Charlotte 20 - SHREVEPORT 14 — 1000 yard runner Jim Nance finds the going ruff against defensive minded Hornets.
(9:00) ('74 Reg.Season: Charlotte 41-10 at NY) (SR: Hornets 1-0)

WFL POWER RATING

	W-L vs. SPD	PR		W-L vs. SPD	PR
BIRMINGHAM	6-10	96	MEMPHIS	10- 3	99
CHARLOTTE	10- 5	90	PHILADELPHIA	7- 9	85
CHICAGO	6-10	83	PORTLAND	7- 7	87
FLORIDA	8- 7	96	SHREVEPORT	5-10	81
HAWAIIANS	6- 7	85	SOU. CALIF.	9- 6	91

PRO POWER RATING

KEY: W-L — Teams Over-All Record vs. Point Spread. **HOME** — Teams Home Record vs. Point Spread. **AWAY** — Teams Away Record vs. Point Spread. **PR** — Teams Power Rating (Power Rating based on TOP RATING OF 99. Allow 3 points for Home Field Advantage when computing probable winning margin.

TEAM	W-L	Home Vs. Spd	Away Vs. Spd	PR	TEAM	W-L	Home Vs. Spd	Away Vs. Spd	PR
Atlanta	1-5	0-4	1-1	98	Miami	0-7	0-3	0-4	107
Baltimore	3-3	1-0	2-3	87	Minnesota	3-4	2-3	1-1	109
Buffalo	3-3	2-2	1-1	103	New Eng.	7-0	3-0	4-0	105
Chicago	5-1	3-1	2-0	97	N. Orleans	3-4	2-1	1-3	94
Cincinnati	4-2	2-2	2-0	104	NY Giants	2-5	1-3	1-2	96
Cleveland	3-3	2-1	1-2	92	NY Jets	2-5	1-2	1-3	96
Dallas	2-5	0-3	2-2	105	Oakland	3-4	1-1	2-3	108
Denver	4-2	3-0	1-2	102	Phila.	5-2	3-0	2-0	102
Detroit	4-3	1-2	3-1	98	Pittsburgh	2-4	1-2	2-2	106
Green Bay	3-3	1-3	2-0	96	St. Louis	6-1	4-0	2-1	102
Houston	4-3	3-1	1-2	90	San Diego	3-4	2-2	1-2	95
Kan. City	4-3	1-2	3-1	96	San Fran.	4-3	1-2	3-1	93
L.A.	2-4	2-1	0-3	106	Wash.	3-4	2-1	0-3	102

What the EXPERTS say...

(College)

CALIFOR +) over U.S.C.

NEBRASKA r Colorado by 22

SYRACUSE (+) over Pittsburgh

(Pro)

CLEVELAND (+) over San Diego

N.Y. GIANTS (+) over Kansas City

5***** Special BUFFALO [+] over N.Eng.

PRO INJURIES

MIAMI — Big fullback, LARRY CSONKA limped off field in second quarter with sprained ankle. Did not return - status uncertain ... **BALTIMORE** — Starting QB BERT JONES injured his left knee in 4th Q. Domres finished the game ... **GREEN BAY** — JACK CONCANNON made his first start ever as a Packer only to lose in final seconds. HADL was warming up on sidelines but did not see action ... **NEW ENGLAND** — Wide receiver RANDY VATAHA played for the first time in three weeks. Made big play in final seconds of 52 yards ... **KANSAS CITY** — WOODY GREEN and ED PODALAK replaced injured WENDAL HAYES and WILLIE ELLISON. QB-DAWSON also started for first time in 4 weeks. **N.Y. JETS** — MIKE ADAMLE replaced running back JOHN RIGGINS who did not start because of injury ... **BUFFALO** — Both starting linebackers did not play vs Chicago. JOHN SKOWPAN was lost for the season with a knee injury and RICH LEWIS should be ready this week after a hamstring injury ... **SAN FRANCISCO** — Starting running back WILBER JACKSON injured his left knee, extent of injury not known. Starting safety MEL PHILLIPS will be lost for season with broken arm ... **OAKLAND** — Receiver MIKE SIANI and linebacker JIM TATUM did not play against Frisco. Sould be ready this week end ... **N.Y. GIANTS** — DEL GAZIO started at QB but was quickly replaced by MORTON who received a standing ovation when he entered game.

Appellant's counsel showed through cross-examination of the expert that a bookmaker commonly altered the line he received so that the odds he uses are his "own" (573-75, 583).

In United States v. Leon, 534 F.2d 667 (6th Cir. 1976), three defendants were convicted of conspiracy and of conducting a gambling business. In reversing the conviction of one Bourgeois, a bookmaker, the court stated that there could be no conviction unless the government established that he was a "conductor" of the business operated by Miller and Leon. The court stressed, in the most arresting passages of the opinion:

> "The only evidence presented at trial that connected Leon and Bourgeois were the recordings of their telephone conversations, and the only evidence contained in them relevant to the precise question we consider was an exchange of 'line' information and the making of bets with each other. Usually, Bourgeois gave his 'line' . . . . Occasionally, Bourgeois placed a bet . . ."
>
> "The government argues that the recordings make clear that Leon way 'laying off' bets with Bourgeois and that this relationship is evidence of a community of interest sufficient to permit the inference that Bourgeois was

> an integral participant in the Leon business" (534 F.2d at 677).

The court reversed Bourgeois' conviction because:

> "After a careful examination of the recordings, we find it impossible to conclude from them that Bourgeois had an interest in the welfare of the business conducted by Leon or that Bourgeois' gambling activity was a part of the business conducted by Leon and Miller" (Id.).

Todaro was not involved in any bookmaking business whereas Bourgeois was a bookmaker as well as a regular supplier of line information. Appellant only made ten telephone calls to the bookmakers which was far less involvement than that of Bourgeois.

The only evidence connecting appellant to the two bookmaking operations was the recordings of the telephone conversations. Appellant rarely, if ever, frequented the Riverside or Kenmore news stands. And he never visited the apartments at Ontario and Terrace Boulevard or knew of their location. Richard Todaro never made or accepted wagers; never made lay off bets; and had no financial interest in either of the bookmaking operations. Yet, even in light of evidence of lay off betting on the part of Bourgeois, the Sixth Circuit reversed Bourgeois' conviction because it was "supported only by circumstantial

evidence from which one can infer either facts tending to prove the defendant's guilt, or facts tending to prove his innocence" (534 F.2d at 677).

As in Leon, it is clear that in our case Richard Todaro had no "interest in the welfare of the business" conducted by the bookmakers or that his minimal contacts with their operation were vital. This was especially so since the information he supplied was available from other sources.

An analysis of the Eighth Circuit's opinion in United States v. Guzek, 527 F.2d 552 (8th Cir. 1975), leads to the irresistible conclusion that appellant's ten calls supplying the line is simply not synonymous with "conduct" as required by §1955. In Guzek there was evidence that the defendant operated his own bookmaking business and placed wagers with another gambling operation. The Eighth Circuit observed that the four recent cases of United States v. Brick,502 F.2d 219 (8th Cir. 1974); United States v. Thomas, 508 F.2d 200 (8th Cir.), cert. denied, 421 U.S. 947 (1975); United States v. Schaefer, 510 F.2d 1307 (8th Cir.), cert. denied, 421 U.S. 978 (1975); and United States v. Bohn,508 F.2d 1145 (8th Cir.),

cert. denied, 421 U.S. 947 (1975), pitched some distance from the facts of our case, are instructive about when the interdependence of bookmakers is established, fusing them into one single business for the purpose of counting all participants toward the five persons necessary for a violation. Guzek holds that "the mere furnishing of line information in and of itself" may not be sufficient to bring a handicapper within the reach of syndicated gambling (527 F.2d at 557-58).

If the supplying of line information by a known bookmaker is insufficient to have him counted as a participant in the gambling business, it is impossible to imagine how appellant - not a bookmaker * - could be deemed to have "conducted" a gambling enterprise by merely furnishing the point advantage for several days.

In United States v. Thomas, supra, the defendants Petrangelo and Thomas furnished the (Wolk) gambling

---

* On the tape recordings, the government expert categorized appellant's activity as that of giving the line (532-36). There was no proof adduced that he ever accepted wagers; therefore, he was not a "bookmaker".

operation with his line and received the book's lay off betting on a regular and consistent basis. Thomas acted as an intermediary in placing the book's bets with an unnamed third party bookmaker and obtained the line from this individual and placed some of his own personal bets when this line was favorable. The court found that:

> "The activities of both Petrangelo and Thomas played a substantial part in the conduct of the Wolk book. Petrangelo aided the Wolk operation by providing a regular and consistent market for Wolk's lay off betting. Thomas served as an agent for or collaborator with the Wolk book in arranging bets under circumstances assumed to be favorable under the line offered by an unnamed third party bookmaker" (508 F.2d at 1206).

When appellant's activities are compared to those of Petrangelo and Thomas, it is clear that appellant's role of occasionally furnishing a line - a line which in fact was nonessential to the operation of the Castellani books - was not substantial. Appellant's activities were insignificant. The Eighth Circuit was careful to point out:

> "(Under) the statute . . . . isolated and casual lay off bets and an occasional exchange of line information may not be sufficient to

> establish that one bookmaker is conducting or financing the business of a second bookmaker" (Id.).

It cannot be stressed too strenuously that the appellant was not himself a bookmaker; thus, it was impossible for him to have engaged in lay off betting.* Therefore, the isolated, intermittent, nonessential line information which appellant transmitted to the bookmakers was insufficient to make him a conductor within the purview of the statute.

In closing, it must be said that Congress never intended that the mere supplying of betting odds to a bookmaker, without more, be condemned by section 1955 because that activity, in and of itself, is clearly not criminal. Clearly, it is not illegal to fix the odds on sporting events, otherwise the New York Post; the Buffalo Courier Express; Basketball News; and Jimmy the Greek are culpable under this law. If the figuring

---

* Lay off betting is the procedure whereby one bookmaker "passes on to another bookmaker the amount of bets by which his own book is unbalanced; thus to the extent he loses to his own customers, he wins back from the other bookmaker, or vise versa" (508 F.2d 1202n.2).

odds is perfectly lawful, then furnishing them to a bookmaker, either through a syndicated newspaper column or over the telephone, cannot be illegal.

The rule that exempts those who lease apartments, furnish telephones and other important services to bookmakers must also apply to handicappers. Although apartments, telephones, heat, light, team schedules and the odds are, in a sense, essential to a bookmaker, the suppliers of these services are not involved directly or indirectly in the acceptance of wagers. Whereas "bankers", "writers", "runners" and "pick-up men", no matter how low-level their station, are involved in the wagering part of the business and have thus been held to be liable. The calculus designed by this Court for measuring illegal gambling activities, proscribed by section 1955, must of constitutional necessity, make this critical distinction.

A person who reads to the bookmaker over the telephone the lines from the New York Post (as Julia Martin did in this case) or tells him when the races start or who won, is not involved in the wagering part of the enterprise.

This data is in the public domain and is available to everyone. As Judge Curtin stressed, the mere furnishing of information cannot be illegal, whether it be the schedule of games; starting times; the game winners; or the point spread. Any over-expansion of section 1955 to include these innocent parties would place an unbearable strain on this statute, rendering it unconstitutional. The boundaries of section 1955 must be restricted to the concern expressed in its legislative history -- large scale syndicated gambling. *

Recently, the United States Supreme Court and this Court, have halted the alarming trend of overextending federal criminal jurisdiction. United States v. Maze, 414 U.S. 395 (1974); United States v. Bass, 404 U.S. 336 (1971); Rewis v. United States, 401 U.S. 808 (1971); United States v. Merolla, 523 F.2d 51 (2d Cir. 1975);

---

*Section 1955 "is intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern, and those corrupt state and local officials who make it possible for them to function"(United States Code, Congressional Administrative News, Vol. II, 91st Congress, 2d Cir., 1970, 4029; emphasis supplied).

United States v. Tavoularis, 515 F.2d 1070 (2d Cir. 1975); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); United States v. Archer, 486 F.2d 670 (2d Cir. 1973).

This Court in Archer lashed out at federal prosecutors who contrived federal jurisdiction in order to herd their victims into federal court, admonishing them against these tactics. In Archer, this Court recognized that: "Today there is widespread concern whether the federal criminal law has not outrun the reasonable bounds . . . " (486 F.2d at 677).

Only this year in United States v. Dixon, 536 F.2d 1388 (2d Cir. 1976), this court, concluding that the mail fraud statute had been misused, stressed:

> "To hold that this alone constituted a violation of the mail fraud statutes would stretch its words beyond normal bounds; 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,' Rewis v. United States, 401 U.S. 808, 812 (1971), quoted and applied in United States v. Bass, 404 U.S. 336, 347-49 (1971)" (536 F.2d at 1401).

Just as Lloyd Dixon's activities should not come in the reaches of the federal mail fraud statute, so too Richard Todaro's conduct does not come within the clutches of section 1955.

Furthermore, any misconstruction of this statute, which imposes criminal sanctions on the dissemination of betting information, will impose significant burdens on the free circulation of legitimate information without any assurance of the effective suppression of large scale, illegal gambling. The borders of section 1955 simply cannot be enlarged any further without jeopardizing the section's constitutionality. To send a man to prison for three years for merely making ten "line calls" to a bookmaker is incompatible with everything we know about this law. For all these reasons, his judgment of conviction should be reversed and the indictment dismissed.

Proof of the Event

Not only must the indictment be dismissed because of the unauthorized expansion of Section 1955 to cover one who merely gives line information, the indictment must be dismissed because there was no proof that the sporting events about which appellant gave information ever took place.

In People v. Abelson, 309 N.Y. 643 (1956), the New York Court of Appeals held in a gambling case that the corpus delicti of the crime is the actual acceptance of the wager upon the outcome of the sporting event. The court then stressed:

> "There is no proof in this record that on the day set forth in the indictment (a) any horse races were run; (b) the names mentioned in the conversations were the names of horses; (c) any such horses were entered or ran in races on such dates; (d) any baseball games were played on the dates designated, or (e) any boxing matches were staged on such dates or that the names heard in the conversations were the names of participants who engaged in such boxing matches." (309 N.Y. at 650).

Section 225.00 of the New York Penal Law provides in part:

> " * * *
>
> 11. 'Policy' or the 'numbers game' means a form of lottery in which the winning chances or plays are not determined upon the basis of a drawing or other act on the part of persons conducting or connected with the scheme, but upon the basis of the outcome or outcomes of a future contingent event or events otherwise unrelated to the particular scheme."

The government's theory of prosecution here is based upon the outcome of a sporting event, i.e. the results of the sports contests. Consequently, it is an essential element of the crime that the government prove the sporting event, or events. See People v. Abelson, supra.

Section 225.35 provides in part:

> " * * *
>
> 2. In any prosecution under this article in which it is necessary to prove the occurrence of a sporting event, a published report of its occurrence in any daily newspaper, magazine or other periodically printed publication of general circulation shall be admissible, in evidence and shall constitute presumptive proof of the occurrence of such an event."

Since the government failed to either produce a daily newspaper showing the sporting events upon which the line was supplied, they have failed to establish an essential element of the crime.

In the case of United States v. Michael Leo Fiorella, et al., No. 1971-45,United States District Court for the Western District of New York, the Honorable Harold P. Burke, March 8, 1972, the court applied this rule of law and charged the jury as follows:

> "In this case the government is required to prove that the sporting events upon which the bets were allegedly made were actually performed; that is, that horse races which were actually bet on, were run; and that basketball games and hockey games were played."*

However, in that case the prosecution produced collateral proof that the events occurred by subsequent conversations, the day after the event which clearly indicated payment upon the transaction. In the case at bar it is

---

* More recently in United States v. Michael Leo Fiorella, et al., No. 1974-220, United States District Court for the Western District of New York, the Honorable Harold P. Burke gave the same instructions.

absolutely essential that the government prove on each day it claims the line was supplied that games were played that day producing a point spread which was the subject of the chance. That can be accomplished by either actual proof of the event or the traditional newspaper. Since they have failed in both instances in this case, the Court is obliged to dismiss the indictment.

The Failure to Prove that Five Persons were Involved in the Bookmaking Business

The government failed to prove that there were five persons involved in a single bookmaking operation. The definition portion of 18 U.S.C. §1955 specifies that, inter alia, "'illegal gambling business' means a gambling business which . . . involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business . . . ." In addition to the persuasive argument that giving the information on point spreads of sporting events in ten instances is insufficient to bring appellant within the purview of the statute (See Point I, supra) is the plain and simple fact five people were not involved in an illegal gambling business.

The evidence adduced leads to the conclusion that there were two separate bookmaking enterprises. The government will surely attempt to magnify out of all proportion the father/son relationship between the Castellani's and distort its significance in an attempt to find a single operation consisting of five persons. No one disputes the fact that Anthony Castellani at one time--prior to the period that is the subject of the instant indictment--worked in his father's news shop, learning the business (330). This expertise and training from Stephen Castellani, one of the best linemakers and bookmakers in the business, aided Tony well when he opened his own bookmaking business in partnership with his cousin Sam Giglia (360).

In February, 1972, Anthony Castellani and Sam Giglia operated their business at the Riverside Newsstand and an apartment at 387 Ontario Street (201, 202). The Kenmore News Shop involved an entirely separate bookmaking operation. Employed in the Kenmore News Shop were three individuals--John Zak, Sarge Sapienza and Joseph Silvagnia-whose primary duties were to tend the store (221, 222, 506, 508). Zak and Sapienza on a few occasions took a bet when Castellani or Giglia were otherwise occupied (506, 507).

Below is a graphic presentation which will dispel any doubt that there did not exist five persons so as to meet the statutory requirement.

RIVERSIDE NEWSSTAND	KENMORE NEWS STAND
1. Anthony Castellani	1. Stephen Castellani
2. Sam Giglia	2. Richard Giglia
3. (Richard Todaro)	3. (John Zak)
	4. (Sarge Sapienza)
	5. (Joseph Silvagnia)
	(#'s 3, 4, & 5 have been placed in parentheses because of their extremely minor participation in the gambling business)

We in no way concede that appellant's peripheral activities amounted to that which in any way approaches "conducting an illegal gambling operation." However, for the sake of argument that there were not five persons involved, we have positioned appellant in the Riverside News Shop operation because virtually all of his calls were made to the Ontario Street apartment, where that venture did its telephone work.

The crucial point is that there is an impenetrable

line between the Riverside News Stand and the Kenmore News Shop. The construction of this wall is justified by the testimony that the two establishments were separate operations, where father and son had virtually no interest in the other, and were maintained by distinct and unrelated records and customers (405, 406, 465, 509).

Even if one counts appellant as a participant in the Riverside concern, there still are only the three people. Giving the government as many concessions as may be reasonably made within the confines of the proof, one might be able to place Richard Giglia on the Riverside half because Richard Giglia took the line from appellant at the Ontario Street apartment on February 19 and 20, 1972 (Government's exhibit 60). However, when viewed in conjunction with the fact that appellant made but one call to the Terrace Boulevard address on February 19, 1972, that Giglia was at the Ontario Street apartment on February 19 and 20 is sensible. Stephen Castellani, the driving force behind the Kenmore business, was leaving for a Florida vacation on February 20. Although his operation and his son's were totally disjointed, it is not illogical for a father to be worried that his son's business will

flounder. That is why he arranged for Richard Giglia to double check the quality of the information that appellant was going to provide for Anthony Castellani. That Stephen Castellani occasionally helped his son out if the younger Castellani was having difficulty is not an indicia of one business. Rather, it is akin to two neighborhood stores whose proprietors are friends and aid each other in a crisis. Consistent with appellant's theory of the case, the court charged:

> "If you find here that there were two groups, then to determine whether or not this was really one business, then you may take into account all of the associations that you find between them to determine whether or not they were casual, whether they were intermittent, whether or not they were essential to the carrying on of the business. If they carried out whatever was done through a spirit of friendship or because of relationship between father and son, but it was not necessary for the carrying out of the other business that services be provided then, of course, the businesses or the association; whatever it was, would not add up to a single business" (944, 945; emphasis supplied).

In light of the fact that Anthony Castellani and Stephen Castellani had different records, customers and business locale,

and that any assistance one received from the other was friendly advice or a favor to the one in the other separate operation, it was against the weight of the evidence for the jury to conclude that there was but one enterprise.

Moreover, the indictment must be dismissed because not only was there no proof that five persons were conducting an illegal gambling business, there was absolutely no evidence adduced to show appellant's involvement for a period of 30 days. United States v. Bridges, 493 F.2d 918 (5th Cir. 1974), interpreted the five person/thirty day requirement of §1955. There it was held that there was no violation of the statute when the gambling business had been in operation for a period of 30 days but where the fifth defendant had only been involved for 18 days. In the instant case, if one adopts arguendo the government's position that there was one business, appellant is the fifth participant. In light of the testimony as to their servile activities, there is no way that Zak, Sapienza, and Silvagnia could be counted as any of the five persons. Appellant gave the odds information for a period of only twelve days. Therefore, in line with Bridges, he cannot be convicted of violating §1955 in absence of proof of the conjunctive elements of 30 days and five persons.

In United States v. Tarter, 522 F.2d 520 (6th Cir. 1975), the government theorized that the proprietors of two separate establishments were the operators of a single gambling business in violation of §1955. However, the court reversed the conviction of a dealer of one of the proprietors when it found that:

> "The only evidence from which it might be inferred that Howard Donnelly and Lewis Tarter conducted a single gambling business was that Donnelly vouched for Tarter when Tarter leased the Pastime Cafe, that Donnelly assisted him occasionally in payment of his rent, and that Donnelly was present at the Pastime Cafe on three occasions . . . . [W]e hold it is insufficient to support a finding that the poker game at Howard's Grill and those at the Pastime Cafe were a single gambling business. Accordingly, the conviction of Leslie Cooper, Howard Donnelly's dealer, is reversed" (522 F.2d at 526, 527).

It is impossible to find appellant guilty under §1955 without viewing the Anthony Castellani and Stephen Castellani books as a single gambling enterprise. The evidence adduced, especially when examined in comparison with Tarter, leads to the irrefutable conclusion that they are separate entities.

The government also failed to prove that on a single day when the gross revenue of the gambling operation was $2,000 there were five persons conducting an illegal gambling business. In order to sustain the conviction, a showing of the existence of five persons and $2,000 on the same day must be made. See United States v. Bridges, supra.

Agent Holmes testified that out of the 14 days of electronic surveillance to which he listened - February 16 to February 29, 1972 - there were five days when the total of the sports wagers exceeded $2,000 (529, 530). However, there was no evidence adduced that on any of these five days on which $2,000 was bet there were the required five persons. An analysis of the participants and their various duties will convincingly establish the government's critical failure of proof.

There was testimony that Sapienza, Silvagnia, and Zak all worked in the Kenmore Newsstand; however, they were continually in and out of the shop. No proof was offered to show on what days they might have been in the store or on what days they might have occasionally taken a bet. Therefore, they cannot be counted toward the five person total. Moreover, even proof that they took an

occasional bet is an insufficient basis on which to count them toward the five because of the rule that a mere employee who has no ownership in a gambling business and who is also without the power to conduct, etc. cannot be considered one of the necessary five persons. See United States v. Harris, 460 F.2d 1041 (5th Cir. 1972), cert. denied, 409 U.S. 877 (1973).

The five days on which the sports wagers exceeded $2,000 were February 16, 19, 21, 25, and 26 (259, 530). Admittedly, appellant relayed the point spreads by telephone on each of these days. Not counting appellant, there is proof of participation of merely three people. Even if one includes appellant, there are still only four participants. No where is there proof of the fifth crucial person. Sam Giglia, Anthony Castellani's supposed partner, cannot be found anywhere on the transcripts of the electronic recordings of telephone calls monitored between February 16 and February 27 (Government's exhibit 60). Therefore, the government failed to prove that five persons conducted, etc. a gambling business which had a gross revenue of $2,000 in any single day. Thus, the indictment must be dismissed for insufficiency.

The Dismissal of the Conspiracy Charge Requires a Directed Verdict of Acquittal

Judge Curtin dismissed the conspiracy count of the indictment, for lack of evidence. The conspiracy count charged that Richard Todaro conspired to violate section 1955 with the very persons whom the government alleged made up the five or more persons who violated the substantive count charging a violation of that statute. Implicit in section 1955, for there to be a violation of section 1955, the five or more persons must be acting in concert. The language, "If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business . . . " implies concerted action by agreement. But when the Court found the appellant did not conspire with the bookmakers to violate section 1955, implicit in that ruling was the lack of acting in concert to violate this substantive provision. Of course, the cases are legion in this Court holding that although defendants may be acquitted of the substantive offense, they may still suffer a conspiracy conviction. But our case is different, for here the court found, as a matter of law, appellant

did not agree with the bookmakers to violate section 1955. That conclusion clearly forecloses a subsequent conviction of section 1955 because the time period under both counts of the indictment is identical, and both counts involve the same individuals. Any other interpretation would mean that a defendant could be convicted of acting in concert under section 1955 without ever agreeing to violate that section. This is legally impossible.

For all these reasons, the judgment of conviction should be reversed and the indictment dismissed.

POINT II

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR DESTROYING PROPERTY IN VIOLATION OF 18 U.S.C. §2232.

This appeal questions the legal sufficiency of the evidence required to sustain a conviction of destroying property which is the subject of the search warrant in violation of §2232 of Title 18. As a predicate for a conviction under this statute, a defendant must know that the property demolished was covered by a search warrant. And since this is a criminal case, that critical fact must be established beyond a reasonable doubt. United States v. Gibbons, 331 F.Supp. 970, 972 (D. Del. 1971), aff'd, 463 F.2d 1201 (3d Cir. 1972). Surely this traditional rule needs no scholarly vindication. It has been universally applied in similar cases. Walker v. United States, 93 F.2d 792 (8th Cir. 1938) (influencing a witness); Cf. Pettibone v. United States, 148 U.S. 197 (1893); United States v. Solow, 138 F.Supp. 812 (S.D.N.Y. 1956).

Judge Curtin, quite properly, tracked the language of Gibbons and instructed the jury that the "Government is required to prove that . . .

under the circumstances the defendant knew the agent had a search warrant" (953). This instruction became the law of the case and the jury was bound by it. However, as we shall now point out the prosecution's proof fell far short of this legal and constitutional mark.

On March 6, 1972 FBI agents George Fellows and James Caufield, armed with search warrants, went to Richard Todaro's home at 52 Bannard Avenue in the Town of Tonawanda outside of Buffalo (607-609). * When no one responded to Agent Fellows' announcement at the front door, he went around to the back door and found it unlocked (610, 611, 619). He claims he announced himself as being with the FBI but admitted it may not have been loud enough for an occupant of the house to hear (611, 619, 626). He unlocked the front door from the inside so that Agent Caufield could enter the house (611, 619). Both FBI agents

---

* The search warrant provided, in the most general language, for the seizure of flash paper. On or about March 5, 1972 United States Magistrate Edmund F. Maxwell signed a search warrant in the case of United States of America vs. Richard Todaro, authorizing any special agent of the Federal Bureau of Investigation to search for and seize flash paper. A similar warrant was issued for 52 Bannard Avenue, Tonawanda (634, 635).

then made a cursory examination of the first floor (611, 620).

Finding no one there, they started up the stairs to the second floor (611, 620). Again, Agent Fellows claims he said "FBI" as he climbed the stairs but could not swear that he stated that he possessed a search warrant (620, 621, 626). Significantly, in his report, although he recorded that he announced "FBI" there was absolutely no mention that he ever announced the possession of a search warrant (621, 624) -- a conspicuous omission to say the least. On cross-examination, after being confronted with his "302", Agent Fellows confessed that he could not swear that he said anything about search warrants. *

---

* "By Mr. Fahringer:
Q. I am showing you Court Exhibit 13 (the "302") and I ask you whether that is a reproduction of your report covering the search of Mr. Todaro's home on March 6, 1972?
A. Yes, sir.
Q. And is it dated the very same day, March 6, 1972?
A. It is.

* * *

Q. You don't say anything about announcing "search warrant", do you?
A. No, sir (622).

* * *

Q. Nothing mentioned about announcing "search warrant", is there, in the report?

continued on next page

Although Agent Fellows was examined about his entrance into the home before the grand jury he never stated that he announced that he was from the FBI or that he said he had a search warrant (625, 626). These glaring and uncontroverted facts leads inescapably to the conclusion the that the words search warrant were never mentioned until

---

continued

A. No, there isn't.

* * *

Q. Well, don't you put the important things down?
A. Yes, we do.
Q. All right. You put in that you announced yourself as FBI, didn't you?
A. Yes.
Q. Okay. Now, let's see about when you went upstairs, 'Immediately upon entry Special Agent Fellows and Caufield went to the second floor of the residence via the stairway', and you don't say anything about making a cursory search of the ground floor, do you?
A. No" (623, 624).

* * *

Q. So that in this courtroom today, some three years later, is the first time you have told us about saying anything about a search warrant, isn't that so? Well, let me strike that question. Your testimony today I believe is you may not have said 'Search warrant', isn't that true?
A. It is possible I did not say 'search warrant'.

* * *

Q. (S)o that we are right with this jury, you cannot swear here today that you said 'search warrant', can you?
A. I cannot" (626).

after it was decided to charge appellant with a violation of §2232. It must have then occurred to the agents that these words should have been said resulting in this most unfortunate and dubious testimony.

Just prior to the agents' uncongenial entry of the bedroom, they observed appellant leap from his bed to a desk (611, 612). Then they saw a burst of flame which left no residue (611). Agent Fellows concluded that what he saw burning was flash paper (615). Despite these observations, appellant was not arrested nor were his movements restricted in any way during the time the agents searched the house (629, 630). No evidence of bookmaking was ever found and the agents left appellant's home without taking him into custody (629). Thus, the evidence was plainly insufficient to find that the appellant had violated §2232.

In United States v. Gibbons, 331 F.Supp. 970, 972 (D. Del. 1971), aff'd, 463 F.2d 1201 (3d Cir. 1972), the court stressed:

> "(I)n order to obtain a conviction under Section 2232, a jury must find an intent to do the act charged. Intent carries with it the element of scienter, so that the Section must be interpreted as making it a crime to destroy property or evidence with the knowledge

> that there is an outstanding search warrant or the existence of 'hot pursuit'".*

The rule established in Gibbons is well-conceived and deserves the respect of this Circuit. But of critical importance, this principle of law was given to the jury by the trial judge and became the law of the case. Thus, the jury was bound by the court's instructions as to the appellant's state of mind. The evidence is clearly insufficient to support a finding of this knowledge on appellant's part.

Analogous to this requirement of knowledge in our case is Walker v. United States, 93 F.2d 792 (8th Cir. 1938), where the defendant was convicted of influencing, intimidating, or impeding a witness. The Court, in

---

* In United States v. Feola, U.S. , 95 S.Ct. 1255 (1975), it was held that the statute making it an offense to assault federal officers was enacted to protect federal officers and federal functions and consequently requires no more than proof of an intent to assault. Feola is distinguishable from our situation not only because there are different considerations underlying § § 111 (assaulting, resisting or impeding certain officers or employees) and 2232 but because unlike the circumstances with respect to §111, our case is "one where lawful conduct becomes unlawful solely because of the identity of the individual or agency affected" (95 S.Ct. at 1264).

reversing defendant's conviction stressed:

> "(T)he burden was upon the government not only to prove that Chloe G. Albright was or intended to be a witness at the time of the conversations in evidence, but, also, that the appellant then and there had knowledge or notice or information of that fact, and that it was because of such status that appellant corruptly endeavored to influence her" (93 F.2d at 795).

There was not one iota of proof adduced to show that appellant knew the flash paper he destroyed was the subject of a search warrant. Appellant was clad in pajamas and was alone in the house on the morning of March 6, 1972 (611, 626). Clearly he had been sleeping. The mere fact that the agents claimed they announced "FBI" and assuming appellant heard that announcement, still gave no notice of their purpose of their entry. Appellant could have thought that they were preparing to arrest him. The more usual objective of entering a suspect's home is either to interview or arrest him. The plan of executing a search warrant, requiring judicial approval, is the exception.

To suggest that appellant possessed the requisite scienter simply because he destroyed the flash paper is an

impermissible inference. His igniting the flash paper would be consistent with his notion, albeit mistaken, that Fellows and Caufield were state law enforcement officers. * The possession of flash paper is a crime in New York (see Penal Law §225.15(3)). Inferentially, appellant was destroying the flash paper to prevent what he thought were state officers from finding him in possession of New York contraband. The government never claimed or proved that the flash paper contained any writing. Under these circumstances the destruction was not to prevent seizure of something that was subject to a search warrant.

Since Agent Fellows retracted his original statement claiming he announced possession of a search warrant, there was a critical failure of proof requiring that appellant's judgment of conviction be reversed and that the indictment be dismissed.

---

* If appellant had heard Fellows and Caufield announce "FBI" as they ascended the stairs, why would he have waited until they finished climbing the stairs and enter the master bedroom before he acted? His waiting until the last moment - as the agents were standing in the threshhold of the doorway - to leap across the room and ingnite the flash paper strongly suggests that appellant never heard any announcement, if in fact one was given. The only logical conclusion is that he heard footsteps of men whom he believed were state law enforcement officers.

POINT III

APPELLANT'S SENTENCE SHOULD BE REVIEWED BY THIS COURT BECAUSE THERE WAS A MANIFEST AND GROSS ABUSE OF DISCRETION.

Appellant was convicted of a violation of §1955 for the mere furnishing of line information in ten isolated instances over a period of twelve days. The persons to whom he supplied the non-essential information were admitted bookmakers. They received suspended sentences, fines, or probation. * For his very small role in the

---

* Disposition of Criminal Charges
Plea of Guilty to 18 U.S.C. §1084(a) on September 8, 1972

Defendant	Cr. No.	Sentence (November 17, 1972)
Stephen Castellani	1972-167	$2000 fine; suspended two-year sentence; five years probation
Anthony Castellani	1972-168	$1000 fine; suspended one-year sentence; five years probation
Richard Giglia	1972-166	$1000 fine; suspended one-year sentence; five years probation
Sam Giglia	1972-165	suspended sentence; five years probation
John Zak	1972-169	five years probation

bookmaking business appellant was condemned to prison for three years, despite descriptions of his excellent family life and community work. Clearly, when compared to the sentences of the persons with whom he was indicted, appellant's three year sentence does not reflect a careful and logical consideration of each person's part in the business.

Richard Todaro, a native of Buffalo, has had an enduring, satisfying marriage to the former Rosalie Pantapinto (70a). The Todaro family consists of four children: Linda, 18; Richard, 16; David, 14; and Joel, 12 (70a, 71a). The children are very dependent on their father and look to him for guidance in their educational and recreational lives (71a). Appellant has demonstrated his concern for his community as well as his children by coaching a little league baseball team (71a). He is an integral member of a strong, secure family unit. To take him away from this close family institution would have a shattering effect upon their welfare. Although the defendant was convicted of possessing a weapon nine years ago, he has lead a life free of any serious crime since then. The only factor Judge Curtin stressed at the time of sentencing was that the defendant had been involved

in gambling during a large part of his life. However, all the other defendants who received probation and fines were equally involved in gambling throughout their lives. Stephen Castellani admitted on the witness stand that he had been a bookmaker all his life. He contended that he was the best line maker in the Western New York area; and still these other men received probation and Richard Todaro is sentenced to prison for three years.

We are aware that federal courts have traditionally felt that "a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review." United States v. Tucker, 404 U.S. 443, 447 (1972); see, e.g., Gore v. United States, 357 U.S. 386, 393 (1958); Blockburger v. United States, 284 U.S. 299, 305 (1932). Yet, this Court evinced a willingness to abandon the obsolete rule of non-review of sentences in certain cases. An increasing number of courts have also adopted a policy of appellate review. See, e.g., Woolsey v. United States, 478 F.2d 139 (8th Cir. 1973); United States v. McKinney, 466 F.2d 1403 (6th Cir. 1972); United States v. Daniels, 446 F.2d 967 (6th Cir. 1971); United States v. McCoy, 429 F.2d 739 (D.C. Cir. 1970); Thomas v. United States, 368 F.2d 941 (5th Cir. 1966); Leach v.

United States, 334 F.2d 945 (D.C. Cir. 1964).

This Court has recognized that there are cases in which appellate courts have a duty to examine a sentence. In United States v. Schwarz, 500 F.2d 1350 (2d Cir. 1974), it reversed a drastic sentence imposed upon a young woman convicted of a drug offense. This Court concluded that the trial judge had "employed a fixed and mechanical approach in imposing sentence, rather than a careful appraisal of the variable components relevant to the sentence upon an individual basis" (500 F.2d at 1352). As a result, the sentence was vacated.

Even prior to Schwarz, this Court noted in United States v. Holder, 412 F.2d 212, 214, 215 (2d Cir. 1969), that:

> "If the sentence could be characterized as so manifest an abuse of discretion as to violate traditional concepts, it is possible that we might, pursuant to our power to supervise the administration of justice in the circuit, overturn our long established precedents of non-intervention and intervene."

When the individual possessing the most tangential involvement in a bookmaking business is sentenced to three years in prison while those who pleaded guilty to lesser offenses

but who were, beyond cavil, the true conductors, managers, etc. of the operation are permitted to remain free on probation, gross injustice is apparent. It looks as though appellant is being penalized for electing to stand trial rather than plead guilty to a lesser offense. It is clearly "improper for a district judge to penalize a defendant for exercising his constitutional right to plead not guilty and go to trial, no matter how overwhelming the evidence of his guilt." United States v. Derrick, 519 F.2d 1, 3 (6th Cir. 1975); Baker v. United States, 412 F.2d 1069 (5th Cir. 1969). See also United States v. Marzette, 485 F. 2d 207 (8th Cir. 1973).

The instant case is one of those exceptional situations where one co-defendant has been arbitrarily singled out for an unjustifiably heavy sentence. Thus it is appropriate that this court interfere with the sentencing court's discretion. Cf. Snowden v. Smith, 413 F.2d 94 (7th Cir. 1969).

United States v. Wiley, 278 F.2d 500 (7th Cir. 1960), a most important case, is directly on point. There, the defendant, an accessory with a very minor participation in the crime (unlawful possession of dresses

stolen while moving in interstate shipment and known to have been stolen) was sentenced to prison for three years. Wiley had no prior criminal record. The district court had also sentenced one McGhee, the principal, driver of the truck, and the most active participant in the crime, to two years in prison, notwithstanding the fact that he had four prior felony convictions, was the ringleader of the operation and while out on bond had committed two other similar offenses. Wiley had pleaded not guilty and had stood trial. McGhee had pleaded guilty. The Seventh Circuit noted that:

> "(W)here the facts appearing in the record point convincingly to the conclusion that the district court has, without any justification, arbitrarily singled out a minor defendant for the imposition of a more severe sentence than that imposed upon the co-defendants, this court will not hesitate to correct the disparity. In so doing it is exercising its supervisory control of the district court, in aid of its appellate jurisdiction. This control is necessary to proper administration in the federal system" (278 F.2d at 503; emphasis supplied).

As in the instant case, the Wiley court noted that the disparity could not be justified on the ground that the defendant asked for a trial because his defense was not

frivolous nor raised in bad faith. In Wiley the court set aside the defendant's sentence and remanded to the district court for a proper sentence. That course is the only just relief in the instant case.

The great emphasis today upon uniform sentences is based upon the concept of equal protection under our law. It is manifestly unjust that one man can be condemned to prison for three years for minor participation, while the true conductors received suspended sentences and were placed on probation.

Significantly, in the Second Circuit's Sentencing Study conducted in 1974 in which all the judges of this Circuit were surveyed and asked to proposewhat they felt was a just sentence in twenty designated cases, the median sentence for conviction of the crime of gambling for lottery, presumably under §1955, was three years probation and a $5,000 fine. The most severe sentence imposed by any judge in this Circuit was one year imprisonment and a $3,000 fine. *

---

* The Second Circuit's Sentencing Study, a report to the judges of the Second Circuit, August, 1974, Federal Judiciary Center.

In light of these compelling authorities, there is no rational basis for the unmerciful sentence imposed upon the appellant.

For all these reasons, it is most respectfully urged that appellant's sentence be vacated and the case be remanded to the district court.

Respectfully submitted,

HERALD PRICE FAHRINGER, ESQ.
Attorney for Appellant
BARBARA J. DAVIES, ESQ.
On the Brief
One Niagara Square
Buffalo, New York 14202
(716) 849-1333

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
of Counsel

October, 1976

Affidavit of Service

Monroe County's
Business/Legal Daily Newspaper
Established 1906

The Daily Record

11 Centre Park
Rochester, New York 14608
Correspondence: P.O. Box 6, 14601
(716) 232-6920

Johnson D. Hay/Publisher
Russell D. Hay/Board Chairman

October 20, 1976

Re: U.S. v. Richard Joseph Todaro

State of New York)
County of Monroe) ss.:
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of
Lipsitz, Green, Fahringer, Roll, Schuller and James

Attorney(s) for
Appellant
On October 20, 1976 Two (2)
(s)he personally served ~~three~~ (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix
of the above entitled case addressed to:

Ivan Michael Schaeffer
c/o T. George Gilinsky
P O Box 899
Ben Franklin Station
Washington, DC 20044

☒ By depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Rochester, New York.

☐ By hand delivery

.....John D. Hay.....

Sworn to before me this 20th day of October 1976

.....Notary Public.....

~~Notary Public~~
Commissioner of Deeds